Supreme Court, U.S.
FILED
APR 8 1991
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NO. 90-1600

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

P. DAVID BJURBERG*
ASSISTANT ALABAMA ATTORNEY GENERAL

BETH JACKSON HUGHES
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

## QUESTION PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari and overrule the holding of the Alabama Supreme Court which decided a substantial federal question when it held that the failure of Respondent's trial counsel to make a Batson v. Kentucky, 476 U.S. 79 (1986) objection was presumptively prejudicial under Strickland v. Washington, 466 U.S. 668 (1984)?

## PARTIES

The caption contains the names of all the parties in the court below.

## OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the Respondent's conviction has not yet been reported. A copy of this opinion is reproduced as Appendix A to this petition.

2. The opinion of the Supreme Court of Alabama reversing and remanding Respondent's conviction has not yet been reported. A copy of this opinion is reproduced as Appendix B to this petition.

3. The order of the Supreme Court of Alabama denying Petitioner's motion to stay pending appeal to this Honorable Court will not be reported. A copy of this order is reproduced as Appendix C to this petition.

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## STATEMENT OF JURISDICTION

Petitioner seeks review of a final decision of the Alabama Supreme Court issued on January 11, 1991, reversing and remanding Respondent's convictions for rape in the first degree, burglary in the first degree, and robbery in the first degree. The State of Alabama has filed this petition within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1257.

Even though the Supreme Court of Alabama remanded this case to the trial court for a Batson[1] hearing, the holding of the Supreme Court is final and is the law of the State of Alabama. The case has been reversed and remanded for an application of the holding of the Alabama Supreme Court and not for further proceedings which will alter the holding of the Alabama Supreme Court. Under Alabama law as it now stands, a defense

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

attorney must make a Batson objection to the racial composition of the jury even when it is not in the best interest of his client since the failure to make a Batson objection is presumptively prejudicial under Strickland v. Washington. Thus, the holding of the Alabama Supreme Court is final and the granting of Petitioner's petition for writ of certiorari would be proper at this time.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

## STATEMENT OF THE CASE

On July 11, 1988, the Respondent was indicted by the grand jury of Montgomery County for the offenses of rape in the first degree in violation of §13A-6-61, Code of Alabama 1975, burglary in the first degree in violation of §13A-7-5, Code of Alabama 1975, and for robbery in the first degree in violation of §13A-8-41, Code of Alabama 1975. (C.R. 7-12) A jury trial was held on these matters on August 15-17, 1988. The Alabama Court of Criminal Appeals stated the following concerning the facts of this case:

> "The evidence presented by the State tended to show that between 10:30 and 11:30 p.m. on May 30, 1988, the victim was awakened by an intruder in her east Montgomery home. She was then forcibly raped and robbed. After expressing anger at the small amount of cash in the victim's handbag, the assailant fled.
>
> "The victim then called the police to report the crime. When the police arrived shortly thereafter, the victim was waiting for them outside in her front yard, because she was afraid to be in the house alone. One officer entered her home to make sure the

assailant was gone, then returned outside to where the victim and the other officers were. The victim was interviewed and gave officers a description of her assailant. She was then taken to an area hospital for examination and treatment. Meanwhile, police evidence technicians were searching her home for evidence to aid in identifying the assailant. The search turned up a latent palm print. Several items of evidence were recovered, along with hair and fiber samples.

"The palm print was later compared with, and found to be a perfect match with, the known palm print of Timothy John Yelder, the appellant. Hair, fiber, and semen samples could not be positively identified as having come from the appellant. Experts could state only that, based on the samples, the appellant could have been the assailant. Additionally, investigators discovered that a co-worker of appellant's picked him up at a convenience store near the victim's home between 7:30 and 8:00 a.m. on May 31, 1988. Yelder told his co-worker that he had had a flat tire on his van late on the night before and, instead of calling someone to come and get him, he just slept in his van. Appellant was subsequently arrested, charged, and convicted of first-degree rape, robbery, and burglary." (Appendix A - pages 2-3)

The jury returned a guilty verdict on all three charges against the Respondent. (R. 499-500, Appendix A) At the sentencing hearing, the trial court sentenced Respondent to life imprisonment on the rape charge, 25 years' imprisonment on the burglary charge, and 50 years' imprisonment on the robbery charge. (S.H.R. 13-16, Appendix A)

On September 29, 1988, the Respondent filed a motion for a new trial. (C.R. 70-78, Appendix A) The Respondent amended this motion on November 3, 1988. (C.R. 117-122) In the amended motion, the Respondent alleged that his trial counsel was ineffective because he failed to raise a Batson[2] objection concerning the State's use of its peremptory challenges. (Appendix A) A hearing was held on this motion on December 5, 1988. (N.T.H.R. 1) The Alabama Court of Criminal Appeals stated the following concerning this hearing:

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[2]Batson v. Kentucky, 476 U.S. 79 (1986).

> "At the hearing on this motion, trial counsel testified that 18 of the 73 potential jurors qualified in this case were black. Trial counsel further testified that the State used 17 of its 29 peremptory challenges to remove 17 of the 18 black prospective jurors. The racial composition of the jury was 11 white jurors and one black juror. Trial counsel stated that he made no Batson objection to the State's use of its peremptory challenges to strike black prospective jurors despite the fact that Batson had been decided more than two years prior to appellant's trial. When trial counsel was asked if he had read the recent Alabama decisions on Batson prior to striking the jury in this case, he replied, "Since the Yelder trial I have read the Branch [Ex parte Branch, 526 So.2d 609 (Ala. 1987) (general guidelines set out for application of Batson decision)] decision." (Appendix A - pages 6-7)

After this hearing, the trial court denied the motion for a new trial. (C.R. 88)

The Respondent appealed his convictions to the Alabama Court of Criminal Appeals. On appeal, the Respondent argued that his trial counsel was ineffective because he failed to make a Batson objection to the racial composition of the jury. In a 4-1 decision

issued on May 25, 1989, the Alabama Court of Criminal Appeals affirmed Respondent's convictions. (Appendix A) The Alabama Court of Criminal Appeals refused to reverse Respondent's convictions on the Batson issue because Respondent failed to prove that the decision reached by the jury would have been different absent his trial counsel's failure to raise a Batson objection under the second part of the test for proving ineffective assistance of counsel set forth by this Court in Strickland v. Washington, 466 U.S. 668 (1984).

The lone dissenting judge wrote that the outcome-determinative test of Strickland v. Washington should not be used when the ineffective assistance of counsel claim arises from the failure to make a Batson objection. (Appendix A - page 12) This judge stated the following in his dissent:

> "The test must, of necessity then be one of presumed prejudice, i.e., that if in fact blacks were unfairly removed from his jury,

> the appellant was deprived of a fair trial, a trial whose result is reliable.
>
> "***
>
> "If the appellant's trial was marred by purposeful racial discrimination, then we must presume he has been denied the very protection the right to trial by jury was intended to secure." (Appendix A - pages 12-13)

On June 29, 1990, the Alabama Court of Criminal Appeals overruled the Respondent's application for rehearing.

The Respondent filed a petition for writ of certiorari in the Alabama Supreme Court and asked that court to reverse the judgment of the Alabama Court of Criminal Appeals. Specifically, the Respondent asked the Alabama Supreme Court to hold that his trial counsel's failure to make a Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process was presumptively prejudicial under Strickland v. Washington.

The Alabama Supreme Court granted the Respondent's petition for writ of certiorari. In an 8-1 decision issued on January 11, 1991, the Alabama Supreme Court reversed the judgment of the majority of the Alabama Court of Criminal Appeals and adopted the dissent in that court. (Appendix B) The Alabama Supreme Court held, as follows:

> "[T]he failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant." (Appendix B - pages 5-6).

The Alabama Supreme Court then reversed and remanded this case to the trial court for a Batson hearing. (Appendix B)

## REASONS FOR GRANTING THE WRIT

**THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE HOLDING OF THE ALABAMA SUPREME COURT WHICH DECIDED A SUBSTANTIAL FEDERAL QUESTION WHEN IT HELD THAT THE FAILURE OF RESPONDENT'S TRIAL COUNSEL TO MAKE A BATSON V. KENTUCKY, 476 U.S. 79 (1986) OBJECTION WAS PRESUMPTIVELY PREJUDICIAL UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).**

This Court should grant the Petitioner's petition for writ of certiorari because the Alabama Supreme Court has decided a substantial federal question which needs to be, but has not yet been, addressed by this Honorable Court. In this case, the Alabama Supreme Court held that the failure of Respondent's trial counsel to make a Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges was presumptively prejudicial and constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). This

holding presents a federal constitutional question of significant proportions which this Court needs to address.

This Court set forth the legal standard to be used in determining ineffective assistance of counsel claims in Strickland v. Washington.[3] Strickland sets out two components of an ineffective assistance of counsel claim, as follows:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence

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[3] 466 U.S. 668 (1984).

> resulted from a breakdown in the adversary process that renders the result unreliable.[4]

The correct standard for attorney performance is an objective one, that is, "reasonableness under prevailing norms."[5] This Court defined the prejudice requirement as follows:

> "The defendant must show that there is a reasonable probability that but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[6]

The fundamental issue to be decided in an ineffective assistance of counsel case is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a <u>just result</u>."[7] (Emphasis Added)

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[4]466 U.S. at 687.

[5]466 U.S. at 688.

[6]466 U.S. at 694.

[7]466 U.S. at 685.

Counsel's function is to assist the defendant and make sure that he receives a fair trial.[8] Strategic decisions made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable.[9] This Court also stated the following in Strickland concerning ineffective assistance of counsel claims:

> "Attorney errors come in a infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense."[10]

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[8] 466 U.S. at 685-686, 688-689.

[9] 466 U.S. at 690.

[10] 466 U.S. at 693.

The holding of the Alabama Supreme Court should be overruled by this Court because the failure to make a Batson objection is not a case where prejudice should be presumed.[11] In Strickland, this Court stated the following concerning when prejudice should be presumed:

> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of State interference with counsel's assistance. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible easy for the government to prevent." (Citations omitted.)[12]

Prejudice has been presumed only in cases where a fundamental right has been denied such

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[11] Strickland, 466 U.S. at 692.

[12] 466 U.S. at 692.

as the right to counsel or the right to appeal. See Gideon v. Wainwright and Lozada v. Deeds.[13] These are cases where the right denied was necessary to the truth finding function of a trial. The failure of a defendant's trial counsel to make a Batson objection does not rise to the level of a denial of a fundamental right. See Tollett v. Henderson and Godfrey v. Kemp.[14]

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[13]Gideon v. Wainwright, 372 U.S. 335 (1963); Lozada v. Deeds, 111 S.Ct. 860 (1991).

[14]Tollett v. Henderson, 411 U.S. 258 (1973) (where this Court held that in order to obtain release in federal habeas proceedings on proof that the indicting grand jury was unconstitutionally selected, the defendant must establish that his attorneys advice to plead guilty without having made inquiry into the composition of the grand jury was outside the range of competence demanded of attorneys in criminal cases); and Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988) (where court held that jury discrimination claims must be raised in a timely fashion and that unless a defendant can show cause and prejudice existed or that the State denied him the opportunity to file a timely objection, the Court would not consider the merits of his grand jury challenge).

The fact that the failure to make a Batson objection does not rise to the level of denial of a fundamental right can be ascertained from the language of Batson itself. In order to establish a Batson violation the defendant has the initial burden of proving a prima facie case of purposeful discrimination. Only after the trial court finds that the defendant has made a prima facie showing does the State have to come forward and give a neutral explanation for its challenge of black jurors.[15] The prosecution's explanation for its challenges does not have to rise to the level justifying exercise of a challenge for cause.[16] Since the initial burden of proof is on the defendant and not on the State, it is clear that the failure to make a Batson objection is not such an egregious error as a case involving

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[15]Batson, 476 U.S. at 96-97.

[16]Batson, 476 U.S. at 97.

actual of constructive denial of counsel or state interference with counsel's assistance and therefore does not rise to the level of denial of a fundamental right.

Another indication that the failure of trial counsel to make a Batson objection does not involve a fundamental right is this Court's refusal to make Batson fully retroactive in Griffith v. Kentucky.[17] This Court in a case involving denial of a fundamental right held that its decision regarding denial of that fundamental right was fully retroactive. See Kitchens v. Smith.[18] However, in Griffith v. Kentucky, this Court refused to make Batson fully retroactive and held that the Batson principle could only be applied to pending cases in which a challenge to the composition of the jury was made at the trial level.[19] Thus,

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[17]Griffith v. Kentucky, 479 U.S. 314 (1987).

[18]Kitchens v. Smith, 401 U.S. 847 (1971).

[19]479 U.S. at 314.

it appears that the failure to make a Batson objection does not rise to the level of denial of a fundamental right such as the right to counsel and the right to appeal.

In fact, the holding of the Alabama Supreme Court in Yelder deprives a defendant of his Sixth Amendment right to effective representation of counsel that this Court attempted to protect in Strickland v. Washington and Polk County v. Dodson.[20] In Strickland, this Court held that counsel's function is to assist the defendant and make sure that he receives a fair trial.[21] In Polk County, this Court held that a defendant's attorney best serves the public by advancing the undivided interests of his client.[22]

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[20]Strickland, 466 U.S. at 685-686, 688-689; Polk County v. Dodson, 454 U.S. 312 (1981).

[21]466 U.S. at 685-686, 688-689.

[22]454 U.S. at 318-319.

Under Yelder, a defendant's attorney must make a Batson objection to the racial composition of the jury even though it might not be in his client's best interest to make such an objection since the failure to make a Batson objection to a prima facie case of purposeful discrimination is presumptively prejudicial under Strickland.[23] An attorney in Alabama can no longer look at the jurors which the State has struck and determine that he would have struck these same jurors or ascertain that he had the jury which was the most favorable to his client. An attorney can no longer make a strategic decision that he does not want to make a Batson objection to the racial composition of the jury. Instead, in every case where a prima facie case of purposeful discrimination exists under Batson, the defendant's attorney has to make a Batson objection under Yelder.[24] This is true

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[23]Yelder, Appendix B.

[24]Yelder, Appendix B.

even when the attorney has the exact jury that he wants for his client and has a jury which he believes is favorable to his client thereby failing to advance the undivided interests of his client and depriving the defendant of a fair trial.[25]

It is clear from what is set forth above that the failure to make a Batson objection does not rise to the level of denial of a fundamental right, therefore, the Alabama Supreme Court erred when it held that the

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[25]Under Yelder, a defense attorney may have a jury which is favorable to his client but because a prima facie case of purposeful discrimination exists, the attorney has to make a Batson objection. This becomes a problem for an attorney because of the existing remedies for a Batson violation in Alabama. In some courts, the judge will put the jurors who were discriminatorily struck back on the jury and make the State and defense strike different jurors from the jury. In other cases, the trial judge will make the parties restrike the entire jury. Thus, an attorney could go from having a jury which is favorable to his client to one which is highly unfavorable but the attorney has no choice under Yelder but to make his Batson objection thereby taking a chance that his client will be deprived of a fair trial.

failure to make a Batson objection was presumptively prejudicial. It is also clear that the holding of the Alabama Supreme Court in Yelder deprives a defendant of his Sixth Amendment right to effective representation of counsel. Therefore, this Honorable Court should overrule the decision of the Alabama Supreme Court.

## CONCLUSION

For the reasons stated above, this Court should grant certiorari to decide the substantial-federal question presented in this case.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

P. David Bjurberg

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Beth Jackson Hughes

BETH JACKSON HUGHES
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

## CERTIFICATE OF SERVICE

I, P. David Bjurberg, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 8 day of April, 1991, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent, by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable Arthur Parker
210 Frank Nelson Building
Birmingham, Alabama 35230

Honorable R. B. Jones
210 Frank Nelson Building
Birmingham, Alabama 35203

I further certify I have served all parties required to be served.

P. David Bjurberg

P. DAVID BJURBERG
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:
Office of the Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

2804P